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2 **THE COURT:** We are here in the matter of
3 Securities & Exchange Commission vs. Gregory A. Brady, et
4 al, Case No. 3:05-CV-1416-D. Before the Court this morning
5 is the Motion of i2 for a Protective Order to preserve the
6 confidentiality of documents and for expedited consideration
7 filed January 13th, 2006, as well as a related memorandum of
8 law and appendix. These pleadings were referred to this
9 Court pursuant to the District Court's Order of Reference
10 signed January 17th, 2006.

11 Also before the Court is Deloitte & Touche LLP's
12 Motion to intervene for the limited purpose of seeking a
13 protective order, Motion for Protective Order, and Brief in
14 Support filed January 17th, 2006, with related appendix, and
15 this was also referred to this Court pursuant to the
16 District Court's Order of Reference signed on January 18th,
17 2006.

18 The Court has before it and has considered
19 Defendants' response to i2 Technologies, Inc.'s and Deloitte
20 & Touche's Motions for a Protective Order filed January 23rd,
21 2006, and also Plaintiff's Response and Brief in Opposition
22 to i2 Technologies, Inc.'s Motion for Protective Order,
23 Plaintiff's Response and Brief in opposition to Deloitte &
24 Touche, LLP's Motion for Protective Order, and the related
25 appendix filed January 23rd.

1 And if counsel would please make their appearances
2 for the record.

3 **MR. GALLOWAY:** Judge, Toby Galloway for the
4 Plaintiffs, Securities & Exchange Commission.

5 **MR. GANDY:** Marshall Gandy for the SEC.

6 **MR. WELCH:** Jim Welch for i2 Technologies.

7 **MR. STAMMEL:** Matt Stammel, counsel for Deloitte &
8 Touche.

9 **THE COURT:** Normally I would take the first filed
10 motion first but given that i2's motion I think is going to
11 take more time, I'd like to go ahead and take up the
12 Deloitte & Touche's motion, and it appears from the
13 certificate of conference that the motion to intervene for
14 the purpose of seeking the protective order is not being
15 opposed. Is that correct?

16 **MR. GALLOWAY:** That is correct, Your Honor.

17 **THE COURT:** All right. So the motion to intervene
18 for the limited purpose of seeking a protective order is
19 granted.

20 Now, it appears that the Defendants do not object
21 to the entry of a protective order. The sole dispute is as
22 to the terms, certain terms of the protective order, and the
23 only opposition being asserted is being asserted by the SEC,
24 so Mr. Galloway, I'd like to hear from you with regard to
25 why you oppose entering a protective order as to LLP -

1 Deloitte & Touche LLP's motion.

2 **MR. GALLOWAY:** Yes, Your Honor. On Deloitte &
3 Touche, we recognize that there are some cases that hold
4 that certain proprietary information can be afforded
5 protective status. The SEC, however, does not have any such
6 information in its possession; we didn't request it during
7 our investigation. We simply don't think we need it.

8 The types of materials I'm talking about are
9 things like audit manuals, planning guides and check lists,
10 things that are general from like Deloitte & Touche
11 information as opposed to specific client-related
12 information relating specifically to i2's misstated
13 financial statements.

14 What we have is a large, very large volume of e-
15 mail from i2, and as set forth in our paper in response to
16 i2's motion for protective order, we don't think any of that
17 material is confidential or subject to any sort of
18 protective order.

19 Now, there may be some documents in the Deloitte &
20 Touche materials that haven't been specifically identified
21 by Deloitte & Touche, but there may be some that have some
22 incidental reference to - that Deloitte & Touche's audit
23 methodology. We don't think that the material we have
24 actually would - you know, would contribute to a competitor
25 understanding what Deloitte & Touche's audit methodology is.

1 It simply would just reflect what Deloitte & Touche did on
2 this particular single instance of audit work, and so under
3 the case law - and I would refer to the Court the case we
4 cited in our opposition to Deloitte & Touche's motion to
5 protect - I'm not sure of the pronunciation of this but I
6 believe it's Houbegent (phonetic) v. Development Specialist,
7 Inc. The Court there said documents that reveal Deloitte's
8 auditing procedures and methodology may properly be
9 designated as confidential. However, Deloitte may not
10 simply designate its entire production, which Deloitte
11 admits contains materials that are not protected under Rule
12 26(c)(7) as confidential. That effectively is what Deloitte
13 is asking this Court to do.

14 Your Honor, we would not object to the core
15 proprietary materials as identified by Deloitte & Touche in
16 its moving papers - we wouldn't object to a limited
17 protective order as to that type of material, should the
18 Defendants subpoena that material, but as of yet we don't
19 have it.

20 Finally I think it is an important point to
21 consider that this is a law enforcement proceeding and given
22 the nature of the SEC's mission we try to insure
23 transparency in the securities markets, we bring public
24 interest law enforcement actions in the public's name and
25 the public therefore has a unique interest in monitoring

1 that the conduct of litigation being brought in its name.

2 So that's essentially our position on Deloitte &
3 Touche. We don't have as huge a problem with a protective
4 order as to proprietary materials but the audit materials we
5 have are not proprietary, and that's essentially our
6 position, Your Honor.

7 **THE COURT:** All right. What about their position
8 as reflected in their motion and as supported by the
9 affidavits attached thereto that because the audits follow
10 these proprietary materials and manuals and guides that they
11 reflect this proprietary information? You've asserted that
12 not all of the information is proprietary material but you
13 haven't produced any evidence in support of that. I don't
14 have the materials before me. I can't know from the state
15 of the record what they consist of other than what you told
16 me that some of the materials do constitute just e-mails
17 back and forth, but with regard to the actual audit
18 materials, what about their argument that these audit
19 materials reflect a process that they use which comprises
20 the proprietary materials?

21 **MR. GALLOWAY:** Your Honor, as I understand their
22 argument they're saying that certain specific audit
23 materials related solely to the i2 audit work may contain
24 incidental references to proprietary firm-wide audit
25 methodology. I think it's important to note that it's

1 Deloitte's burden, of course, to show specific reasons for a
2 protective order, they're not conclusory stereotype
3 statements according to the Fifth Circuit, and so while we
4 have not submitted any material in opposition, I don't think
5 they've pointed out anything with any specificity that would
6 constitute that type of protectable information.

7 **THE COURT:** Well, they contended their check lists
8 and materials are proprietary and the audit follows this
9 check list. Doesn't that reflect proprietary material?

10 **MR. GALLOWAY:** It could, Your Honor, but the fact
11 is there's a strong public interest and one of the cases we
12 cited in our brief in full disclosure of accountants'
13 professional services, and while we have no argument that
14 their overall firm-wide audit methodology may well
15 constitute a trade secret, when you balance these incidental
16 references - and that's at most what we're dealing with
17 here, and I can represent to the Court that principally what
18 we have are e-mails among the Defendants and other i2
19 employees, but when you balance that against the strong
20 public interest recognized by the Supreme Court in
21 understanding what an accountant's professional services
22 have been, I think that those incidental references are
23 clearly outweighed.

24 **THE COURT:** Are you disputing that they have
25 produced approximately 75,000 documents, if that was the

1 number in this particular motion?

2 **MR. GALLOWAY:** No, Your Honor, I haven't counted
3 them but they have produced a large volume.

4 **THE COURT:** All right. And, I understand your
5 argument about the public interest and I've looked at the
6 case that you've cited, Lagosch, (phonic) but that appears
7 to me to relate solely to materials filed in support of
8 summary judgment. It talks about judicial documents.
9 That's not what we have here. What we have is discovery and
10 we have a large number of documents that are being produced
11 by a third party.

12 Help me understand why it's not more efficient at
13 this point to allow those documents to be designated
14 confidential and then to the extent that SEC wants to use
15 certain documents to challenge the confidentiality
16 designation and put the burden at that point on Deloitte &
17 Touche to show the Court why they shouldn't be disclosed.

18 **MR. GALLOWAY:** Your Honor, you know, I think
19 Deloitte & Touche is situated a little bit differently than
20 i2. That is a party who is coming here having committed no
21 wrong doing, and we recognize that if the Court believes
22 that that is the most efficient mechanism, I frankly can't
23 argue with it. It's our policy that we conduct our
24 litigation in full public view, and that's the SEC's policy,
25 but if the Court believes that a more protective order is

1 warranted, then I can't argue that that's not the most
2 efficient way.

3 **THE COURT:** I think that based on the affidavits,
4 and granted, they're not as detailed perhaps as they could
5 have been, but I think there is sufficient details to
6 support a finding that the materials are confidential and
7 proprietary, but I think they've met their burden to
8 establish that, and I think for the purposes here, because
9 this is discovery and we're talking about producing them to
10 the Defendants, and they don't have an objection to a
11 protective order, I'm inclined to grant the motion for a
12 protective order, but before I do I'd like to hear from
13 Deloitte & Touche regarding your allegation that a large
14 part of these materials are e-mails are non protected
15 materials.

16 **MR. STAMMEL:** Your Honor, Matt Stammel for
17 Deloitte & Touche. You've really raised all the issues I
18 had intended to raise and the mechanism that the Defendants
19 saying go back to into whatever briefs, but as far as
20 bringing back the documents, if the SEC or the Defendants
21 intend to use the documents, they bring that up to Deloitte
22 and say is this really confidential, do you need to keep
23 this privileged, was the very same turn around and the
24 confidentiality order basically implies a window in which
25 Deloitte has to first try to agree and then failing that to

1 file a motion, so it's a very quick turn around so the
2 parties aren't slow in the litigation process.

3 As far as your question about whether a large part
4 of these are e-mails, I will tell you there are 60 boxes of
5 documents which I went through on a very high level with an
6 associate the other day. There are a lot of e-mails in
7 there but there's also a lot of source documents from i2 and
8 there's a tremendous amount of Deloitte & Touche's work
9 paper related to work on those e-mails, and I would liken
10 this, as you too recognize that these are our confidential
11 and proprietary processes. What we have here are desk
12 files, computer files, cabinet drawers full of the auditor's
13 papers. They've covered everything top to bottom, so what
14 it is is it's essentially like lifting the lid off of a
15 factory and see how certain things are manufactured, and it
16 exposes Deloitte & Touche's audit process. What happened to
17 those, how that information is gathered, how it's followed
18 up on, how it's integrated into Deloitte & Touche's system,
19 how it's separated, what type of things are followed up on.
20 All of those matters are revealed by the totality of these
21 documents.

22 The protective order and the process that the
23 Defendants i2 and Deloitte have worked out to analyze
24 certain documents on a one-on basis - we'd really like to
25 file this and don't want to file them under seal, we need to

1 use this at a hearing, a document considered by itself
2 likely isn't going to be objectionable to Deloitte because
3 it doesn't reveal the audit methodology as a whole. What
4 these 75,000 pages do is it gives a competitor, it gives i2,
5 it gives other audit firms a really good idea of what
6 Deloitte & Touche does in an audit, and as the cases we've
7 cited show, that's a protected trade secret and that's what
8 the affidavits was meant to establish.

9 **THE COURT:** All right. You're not disputing their
10 position that you really don't have any standing to assert
11 privilege on behalf of i2, and they're here and ready to do
12 that for themselves?

13 **MR. STAMMEL:** Absolutely. Our concern a service
14 provider is to not do something that would run afoul of our
15 clients. We just want to make sure that they have an
16 opportunity to say the documents are worthy of protection;
17 that they have their say in that.

18 **THE COURT:** Now the Defendants have submitted
19 their own proposed protective order and I compared it to
20 your proposed protective order and it seems to me that some
21 of the provisions there requesting - I understand the
22 position about wanting to have one similar protective order.
23 Have you looked at their protective order?

24 **MR. STAMMEL:** Absolutely, Your Honor. We worked
25 on it together. There was a series of conference calls and

1 we've all agreed on it and we would support the entry of
2 that protective order.

3 **THE COURT:** The Defendant - the one that -

4 **MR. STAMMEL:** The Defendants'.

5 **THE COURT:** The Defendants'.

6 **MR. STAMMEL:** Unless it was changed and I don't
7 think it was but it was the one that we all talked about on
8 the phone and was submitted to Deloitte would support the
9 entry of that protective order.

10 **THE COURT:** The only real difference I saw between
11 their submitted protective order and yours is that yours
12 requested notice if documents or protected materials were to
13 be used in open court at a hearing, and while theirs
14 referenced that, you didn't provide a period for notice to
15 object and to allow the Court to determine whether it needed
16 to be sealed. Has that been resolved?

17 **MR. STEMMEL:** Frankly, Your Honor, I cannot
18 remember exactly how that came out but I thought we got it
19 to a comfort level that if a party was going to ask that a
20 document be admitted that they would have to do that under
21 seal. I thought that's how that --

22 **THE COURT:** That's what the Defendants' submitted
23 order says. Yours in I think it's Paragraph 6(b) says if
24 you're going to use it in open court at a hearing, at any
25 pretrial hearing, you need to give notice so that we can

1 seek an opportunity to have that hearing sealed, or have
2 that portion of the record sealed, while their proposed
3 order says - it's Paragraph 7, if you want to use it at a
4 hearing the documents are to be filed under seal but there's
5 no mention of what's going to happen at the actual hearing,
6 so if you worked it out with them and this is fine, then
7 that's all I need to know, but I just wanted to make sure we
8 don't get any surprises later on and then . . .

9 **MR. STEMMEL:** Right. Subject to being clarified
10 by the other lawyers. I think that the intent there was
11 that because we're trying to reach a compromise on this that
12 i2 and Deloitte had gotten to a comfort level that the
13 parties would act in good faith, if you will, and not
14 overtly and openly try to get trade secrets out there just
15 for the sake of getting trade secrets out there, and I think
16 that's for the purpose of compromise how we saw this.

17 **THE COURT:** Okay. So at this point Deloitte &
18 Touche has no objection to the proposed protective order
19 submitted by the Defendants?

20 **MR. STAMMEL:** That's right, Your Honor.

21 **THE COURT:** All right. I previously granted the
22 motion to intervene. I think with regard to the Motion for
23 Protective Order on behalf of Deloitte & Touche, I think
24 that Deloitte & Touche have met its burden to establish that
25 the information sought is confidential and proprietary, and

1 balancing the factors given the amount of documents that
2 we're talking about, and Deloitte & Touche's status as a
3 third-party, I'm granting the motion for a protective order
4 and I will be entering the proposed protective order agreed
5 to by the parties and which is attached to the Defendants'
6 response. That will be entered later today, and I believe
7 that that order is applicable to all parties to the
8 litigation; is that correct? Is there any dispute about
9 that, Mr. Galloway, that it does also bind the SEC?

10 **MR. GALLOWAY:** Yes, that's correct. One point of
11 clarification, Your Honor, is you're limiting that solely to
12 the Deloitte & Touche material; is that correct?

13 **THE COURT:** Well, I'm only taking up their motion,
14 but as far as I'm concerned, this order - it appears that
15 the Defendants and Deloitte & Touche have agreed to the
16 terms of this order. I understand the SEC doesn't agree to
17 any order but right now we're only dealing with Deloitte &
18 Touche.

19 All right, so that will be entered later today.
20 That's the order that's Exhibit A to Defendants' response to
21 i2 Technologies' and Deloitte & Touche's motions for
22 protective order.

23 All right, anything else on that motion that we
24 need to address with regard to Deloitte & Touche?

25 **MR. STAMMEL:** Not from me, Your Honor.

1 **THE COURT:** Mr. Galloway?

2 **MR. GALLOWAY:** No, Your Honor.

3 **THE COURT:** And I see that counsel for the
4 Defendants are here in the courtroom. I think you probably
5 want to go ahead and enter your appearances for the record
6 just to reflect that you're here, and I'd like to have you
7 also put on the record that you do agree to this protective
8 order.

9 **MS. O'CONNOR:** Your Honor, Mary O'Connor with
10 Akin, Gump Strauss Hauer & Feld. We too are here
11 representing Gregory A. Brady, and we do agree to the entry
12 of that protective order as to Deloitte & Touche.

13 **MR. GIBSON:** Your Honor, Michael Gibson - oh, Ed.

14 **MR. KOPPMAN:** For the record, Your Honor, I am Ed
15 Koppman with Akin Gump, counsel for Greg Brady.

16 **THE COURT:** All right.

17 **MR. GIBSON:** Your Honor, Michael Gibson
18 representing Bill Beecher and we enter an appearance for
19 purposes of this hearing and we do agree to the order. We
20 were a part of the group that settled it and we agree that
21 the Court may enter it.

22 **THE COURT:** All right.

23 **MR. GIBSON:** And David Meadows from my office is
24 here also for Mr. Beecher.

25 **THE COURT:** All right, thank you.

1 **MR. PEARSON:** Eric Donovan Pearson representing
2 Reagan Lancaster. We also agree to the terms of the order,
3 Your Honor.

4 **THE COURT:** Then that order will be entered. All
5 right, let's take up i2's motion. I have several questions
6 for you.

7 **MR. WELCH:** Okay. Jim Welch, Your Honor, with
8 Brown McCarroll representing i2.

9 **THE COURT:** All right. The SEC is contending that
10 you have produced some of this information prior to the
11 entry of the agreement, which is attached to your appendix
12 as Exhibit B, I believe, and that really what they thought
13 was at issue were the Baker Botts materials. Now I've
14 looked at that agreement and it looks like you tried to make
15 it applicable to what had previously been produced but it's
16 not completely clear if that's the documents that are being
17 referred to that are the non Baker Botts documents, so tell
18 me what's been produced, when it was produced, and what it
19 was produced subject to.

20 **MR. WELCH:** Your Honor, yes. Do you have a copy
21 of the agreement?

22 **THE COURT:** Right here.

23 **MR. WELCH:** The agreement specifically references
24 the documents that were produced as part of the internal
25 investigation that was conducted. At the end of that first

1 paragraph there had been documents previously produced, and
2 there's case law cited in our brief that suggests that
3 that's not any waiver if you produce documents prior to the
4 entry of an order. But at the end of that first paragraph
5 it says in addition, as you know, the audit committee and
6 the company both have previously provided information and
7 other documentation to the staff. These previously produced
8 materials are also to be treated as confidential. That very
9 next line then also contemplates producing documents after
10 the date of this agreement and I would suggest then that all
11 documents, those produced prior to, at this time and
12 thereafter, are subject to this agreement, and as you have
13 noted I'm sure on the back that this was entered into by not
14 only the SEC but the company as well as the audit committee
15 of the company's board of directors.

16 And Your Honor, if it had just been the internal
17 investigation materials, there would have been no reason for
18 the company to even sign off on that. It would just be
19 limited to the audit committee.

20 **THE COURT:** All right. The SEC is alleging that
21 based on the age of the documents, and given that the
22 documents were created several years ago, that at this point
23 in time there's no need to treat them as confidential any
24 longer, given how quickly technology changes, and I'd like
25 for you to address that argument.

1 **MR. WELCH:** A few things. One, they don't point
2 out any documents which are now obviously stale I think is
3 how they referred to them, and undoubtedly there would be
4 some documents if we went through all 500,000 pages. We'd
5 probably find some documents that are no longer fresh or in
6 need of protection. However, given the long list of the
7 documents and the types of documents that are involved, some
8 of those are still documents that would cause i2 harm in the
9 market place if they were revealed to any competitors or
10 other businesses who are just trying to get access to the
11 documents for some sort of competitive or business
12 advantage.

13 **THE COURT:** Are these the same documents that were
14 at issue in the - is it Shiner, Shiner case?

15 **MR. WELCH:** Many of the documents will be the
16 same. The issues were virtually the same, and also although
17 the SEC's response brief isn't clear on this point, the
18 documents aren't limited to documents dated in the year 2000
19 or 2001. They go beyond that into 2003, and there is a
20 continuing request for documents, so these are not all
21 documents that are five years old. Some of the documents
22 are much newer than that.

23 **THE COURT:** It looks to me from the language of
24 the agreement that the SEC has a very broad discretion as to
25 how to use those documents that determines that disclosure

1 is otherwise required by law or be in furtherance of the
2 Commission's discharge of its duties and responsibilities.
3 Haven't you pretty much given the leeway to use these - how
4 they see they need to use them?

5 **MR. WELCH:** I wouldn't say how they see fit but we
6 certainly don't object to their use of these documents in
7 any litigation they're involved in, which is this case. We
8 recognize they have an obligation to produce the documents
9 in this case to these defendants. We don't dispute that.
10 They can enjoy the unfettered use of the documents as they
11 argue in this case, but there's no reason why they should
12 not agree to a protective order so that others use them
13 outside the case. That wasn't part of our agreement. Their
14 ability to do that now really renders the whole agreement
15 meaningless. If they simply can sit back and let others
16 come and look at the documents because they're using them in
17 another case, then the fact that all of the parties went to
18 this trouble to enter into this agreement would be rendered
19 meaningless at this point, and Your Honor, if I might,
20 that's just on the issue of this agreement. This is not the
21 only basis for a protective order. It's a routine matter in
22 most cases. Most of the time parties agree to them. The
23 Defendants have all agreed to it. As you just discussed
24 with Deloitte's counsel, Deloitte, i2 and all the Defendants
25 agreed to a form of order, and a form of order, by the way,

1 very similar to the form of order that the SEC has agreed to
2 in another case. We modeled it after that, and although
3 there's some variances, it's very similar to that. It's not
4 as if they've never made this agreement before, and so the
5 fact that they may have a policy, apparently there are
6 exceptions to the policy, but i2 has met their burden.
7 They've submitted affidavits describing the types of
8 documents that are included in this half a million pages,
9 and clearly not every document in that half a million pages
10 is something that warrants protection, but like Deloitte to
11 go through 500,000 pages and engage in a process with the
12 SEC over which ones should be protected and which ones
13 shouldn't, is not the most efficient way to proceed. i2
14 submitted affidavits from both John Harvey and Cathy
15 Bonichelli (phonetic) that describes some of the types of
16 documents that are included in here.

17 The SEC does spend a lot of time in their response
18 arguing the customer and price list don't warrant protection
19 at this point, and without arguing that point they ignore
20 the long list of other materials that was included in that
21 affidavit, and that list - internal communications, and
22 counsel for the SEC sort of dismissed e-mails as being
23 anything warranting protection, but in this date there's no
24 difference between an e-mail and any other type of document.
25 The fact that it's an e-mail doesn't make it less

1 protectable.

2 Communications with customers regarding
3 capabilities and integrated nature of the software. That's
4 the very type of document that Judge Sanders specifically
5 referenced in the Shiner case.

6 Information regarding i2's intellectual property,
7 certainly they don't - although they gloss over it, they
8 don't dismiss the fact there is reference - there are
9 references to i2's intellectual property in there. There's
10 information regarding i2's product development, i2's product
11 release processes, and processes is not something that ever
12 becomes stale, the way you run your business, the way you
13 operate, much like Deloitte's processes in auditing. Those
14 don't become stale by age. Product functionality maps,
15 commission analysis of product release management and
16 product marketing processes, again something that doesn't
17 become stale. Strategic plans are not typically short-term
18 one-year type plans. They include long range plans.

19 Personnel files and records, those weren't
20 specifically mentioned but they were specifically requested
21 by the SEC in their investigation, and although they
22 promised to protect those - the confidentiality, I don't
23 think that's sufficient in this case, and of course, the
24 investigative materials. Those are all materials described
25 in the affidavits. There is nothing to controvert any of

1 that and certainly good cause would be shown to protect that
2 information.

3 **THE COURT:** Now, would you agree with me that
4 you've waived any confidentiality as to the documents that
5 were attached to your Motion to Dismiss?

6 **MR. WELCH:** Attached to the Defendants' motions?

7 **THE COURT:** Weren't there documents that were
8 attached to - was it Defendants' Motion to Dismiss or your
9 Motion to Dismiss?

10 **MR. STEMMEL:** Your Honor, it was the Defendants'
11 Motions to Dismiss. It was the three defendants in this
12 litigation.

13 **THE COURT:** Oh, the Defendants' motion. Okay.
14 Was it in the prior litigation where your client was the
15 Defendant?

16 **MR. WELCH:** Yes, i2 was the Defendant in the
17 Shiner litigation.

18 **THE COURT:** That's as I recall, so if there were
19 documents that were attached to the motion to dismiss in the
20 Shiner litigation was that Motion to Dismiss sealed or were
21 those documents sealed or were they made public?

22 **MR. WELCH:** Your Honor, it was the complaint that
23 was at issue in that case and Judge Sanders redacted - had
24 those parties redact the complaint, and then make public the
25 redacted version.

1 **THE COURT:** Okay. And I recall that from the
2 opinion that was attached to the SEC's appendix, but what
3 I'm saying is that if the - if i2 filed a motion to dismiss
4 in that lawsuit and attached documents, were those documents
5 sealed? Was that pleading also sealed or was it a part of
6 the record.

7 **MR. WELCH:** Your Honor, I wasn't involved in that
8 litigation so I really - I don't know and can't answer that.

9 **THE COURT:** Okay. Have you looked at the proposed
10 protective order submitted by the Defendants in this case?

11 **MR. STEMME:** I have and we, like the Deloitte &
12 Touche lawyers, participated in working that agreement out.

13 **THE COURT:** All right. So if I were to decide
14 that a protective order is appropriate in this case you
15 don't object to the form submitted by the Defendants?

16 **MR. STEMME:** That's correct, we agree with that
17 form.

18 **THE COURT:** All right. Mr. Galloway, tell me
19 about the Motion to Dismiss and the documents attached to
20 it.

21 **MR. GALLOWAY:** Okay. I'm not familiar with the
22 private litigation of what i2 may have attached to its
23 Motion to Dismiss. I'm confident that i2 did move to
24 dismiss but I don't know what they attached. What I can
25 tell you --

1 MR. WELCH: Your Honor, if I might, we're not
2 adopting what's attached to that motion.

3 THE COURT: Okay.

4 MR. GALLOWAY: What I can tell you, Your Honor, is
5 that i2 was involved - because they were trying to exhibit
6 cooperation with the SEC's investigation, i2 was involved in
7 - was well aware of the litigated enforcement action against
8 the three Defendants here. This was filed in July, and in
9 our complaint we specifically quoted documents that i2 now
10 contends are confidential. Not only that, we put out a
11 litigation release so even if i2 somehow had missed the fact
12 that the case had been filed in open court, we put out a
13 press release on our website. The Defendants here have
14 indeed filed voluminous documents and their appendices and
15 defense in support of their motions to dismiss the SEC's
16 complaint, i2 has never once made any claim that those
17 documents were confidential.

18 Indeed when the subject of confidentiality first
19 came up it had only to do with the Baker Botts materials. I
20 thought it was only fair, because there was an agreement,
21 that i2 ought to be able to make whatever arguments it
22 thought it had, so I notified counsel, and at that time,
23 those are the only documents we discussed. It was not until
24 December 21st, after 200 boxes of documents that i2 has now
25 claimed are confidential, had already been produced to the

1 Defendants that i2 made clear that they were now trying to
2 cast a very wide net with that confidentiality agreement and
3 cover all the documents.

4 So I think under those circumstances there has
5 been a waiver. What's more I understand from counsel for
6 Kmart that these very same documents are at issue and have
7 been at issue for months in the Kmart litigation and that i2
8 has not once argued that any of these materials are
9 proprietary or confidential.

10 **THE COURT:** Well, I saw the letter in your
11 appendix but I don't really have anything before me on the
12 Kmart litigation and that's really not a factor for me to
13 consider, and if Kmart needs the documents they certainly
14 are free to seek them from the Court for that litigation
15 pending.

16 To the extent you can show me something that says
17 - or show me where they've taken an inconsistent position in
18 another lawsuit, that's different but what's attached to
19 your appendix is Kmart's response to i2's discovery
20 requests. There's nothing from i2.

21 **MR. GALLOWAY:** What I can show you, Your Honor, is
22 the multitude of transmittal letters that i2, through its
23 counsel Deckard, LLP from Washington, D.C., submitted when
24 producing documents, they never referenced the
25 confidentiality agreement. In contrast, Baker Botts, which

1 represented i2's audit committee, routinely - and I believe
2 in every instance - referenced the confidentiality
3 agreement, which I think demonstrates that all the parties
4 have the same understanding. Certainly the Commission never
5 intended to agree with i2 that all these 200 boxes of
6 documents were confidential, and I think based on their own
7 transmittal letters it's clear that they shared that
8 understanding, Judge.

9 **THE COURT:** Well, I'd like to see those
10 transmittal letters because I don't recall seeing them in
11 the appendix, and the other point I wanted to make is that
12 the language of the confidentiality agreement is pretty
13 broad as to that too. I mean they clearly asked to make all
14 documents produced before, designated as confidential, and
15 it's signed off on by the SEC, so it looks like the SEC is
16 taking an inconsistent position here from the documents
17 rather than i2.

18 **MR. GALLOWAY:** Your Honor, if I may approach?

19 **THE COURT:** Absolutely. Has opposing counsel seen
20 these?

21 **MR. GALLOWAY:** I have provided them to them. They
22 are in the box in front of Mr. Welch. What you have in
23 front of you, Your Honor, are, like I said, a multitude of
24 letters from Deckard and not once to my knowledge did
25 Deckard ever reference the confidentiality agreement in

1 producing documents on behalf of its client, i2
2 Technologies. On the other hand - now they did seek FOYA
3 protection, which is a completely separate matter, which
4 I've addressed in our response. On the other hand, Baker
5 Botts, there is a tab I believe in the materials before you,
6 Your Honor, that separates what's Baker Botts from Deckard.
7 The Baker Botts materials clearly, always references the
8 confidentiality agreement, and that, of course, is entirely
9 is consistent with what our understanding was all along.

10 **THE COURT:** All right. Rather than take time on
11 the record to go through this, you're not disputing that
12 they sought to keep the Baker Botts materials confidential
13 through the agreement?

14 **MR. GALLOWAY:** During the investigation, yes, Your
15 Honor, that's true.

16 **THE COURT:** All right. The dispute here is
17 whether - as far as the agreement, the confidentiality
18 agreement that was signed in May, what you're contending is
19 that all of the non Baker Botts materials they did not seek
20 confidential protection for those?

21 **MR. GALLOWAY:** That is certainly my position and
22 it frankly came as a flash to me on December 21st when I
23 received the letter that I saw they took a different
24 position that was dramatically different from all the
25 letters that you see before you.

1 **THE COURT:** Okay. Now, on your website was it
2 just a press release or discussion of the investigation or
3 have you actually posted these documents?

4 **MR. GALLOWAY:** No, the documents themselves are
5 not posted. My only point there, Your Honor, was to suggest
6 that i2 - but none of this has been conducted in secret. i2
7 has been aware of everything that the SEC has done in
8 connection with this investigation and the subsequent
9 litigation.

10 **THE COURT:** Has the SEC produced documents that
11 were turned over by i2 to any party at this point?

12 **MR. GALLOWAY:** No. The only use we've made of
13 those documents is, for instance, when we took investigative
14 testimony from Karen Austin, who is a representative of
15 Kmart, she was shown certain documents, and of course, we
16 had to show those in the discharge of our duties, but as far
17 as producing documents, no, we haven't produced them to
18 anyone other than the three Defendants in this lawsuit.

19 **THE COURT:** So you have produced them to the three
20 Defendants in this lawsuit?

21 **MR. GALLOWAY:** Yes, Your Honor. Let me be clear.
22 During three weeks in December we made available all 200
23 boxes of documents produced by i2 and all of those documents
24 have been produced and reviewed by defense counsel before
25 Ms. Bonichelli (phonetic) sent her December 21st letter

1 taking this new position that all the documents were covered
2 by the confidentiality agreement.

3 **THE COURT:** All right. Were the Baker Botts
4 materials produced to the Defendants?

5 **MR. GALLOWAY:** No, Your Honor, they were not.

6 **THE COURT:** Okay. So you have produced the non
7 Baker - I think that was the terminology that you used in
8 your response and that's I think an appropriate description
9 you used - the non Baker Botts materials that you received
10 from i2 were produced to the Defendants in December but the
11 Baker Botts materials have not been produced?

12 **MR. GALLOWAY:** That's correct. Now, just to - I
13 hate to muddy it up further, Judge, but in the last week all
14 the parties have agreed that they would maintain the
15 confidentiality of even Baker Botts materials pending this
16 court's ruling because I wanted to produce those documents
17 as expeditiously as possible. I have made them available
18 but I would suggest that certainly there has been no waiver
19 on the Baker Botts materials.

20 **THE COURT:** All right, but certainly prior to the
21 filing of the motion the Baker Botts material has been
22 treated as confidential by the SEC pursuant to the
23 agreement?

24 **MR. GALLOWAY:** Your Honor, we have tried to afford
25 them an opportunity to be heard. We never took the position

1 that they were confidential in the sense that we didn't have
2 the - we didn't have the ability to use them in the
3 litigation as we see fit in furtherance of our duties as
4 expressly set forth in the original.

5 **THE COURT:** Well, you considered them subject to
6 the agreement. You didn't produce them in December with the
7 other non Baker Botts materials.

8 **MR. GALLOWAY:** That's correct, Judge.

9 **THE COURT:** Okay. Now, tell me about the notice
10 that i2 had that the non Baker Botts materials were being
11 produced to the Defendants.

12 **MR. GALLOWAY:** Your Honor, I can't point you to a
13 document. All I can tell you is that I spoke to Cathy
14 Bonichelli (phonetic) on a number of occasions in November
15 of 2005 and we focused exclusively on the Baker Botts
16 materials. It was plain that the document production was
17 forthcoming. As to all the documents, Ms. Bonichelli
18 (phonetic) never once said that all these other documents
19 are subject to any sort of protection. As I mentioned to
20 the Court, when I got her letter on December 21st I was
21 somewhat taken aback.

22 **THE COURT:** Had any Baker Botts materials been
23 produced by i2 prior to the entry of the confidentiality
24 agreement?

25 **MR. GALLOWAY:** I'm not sure I understand the

1 question, Your Honor.

2 **THE COURT:** All right. Let me see if I can back
3 it up. The confidentiality agreement appears to have been
4 signed on or about May 28th, 2003. That's the one that's
5 attached to i2's appendix as Exhibit B.

6 **MR. GALLOWAY:** Yes.

7 **THE COURT:** Prior to the execution of this
8 agreement, had i2 turned over any Baker Botts materials to
9 the SEC?

10 **MR. GALLOWAY:** Not to my knowledge. They had
11 produced thousands of pages of other documents. The
12 investigation had been ongoing for six months prior to that
13 confidentiality agreement but I don't believe any Baker
14 Botts materials had been produced.

15 **THE COURT:** Okay. So when it says in the
16 agreement previously produced materials, that did not refer
17 to any Baker Botts materials that had been produced before?

18 **MR. GALLOWAY:** To my knowledge, no, Your Honor.

19 **THE COURT:** So that tends to support their
20 argument that they intended those - that non Baker Botts
21 materials to also be covered by the agreement, if that's
22 what had been produced at that point.

23 **MR. GALLOWAY:** That certainly - it was not our
24 interpretation. That may well have been theirs. I think
25 the fact that their letters referenced - later didn't

1 reference those - the confidentiality agreement bears on
2 what their intention was, but in any event, as the Court has
3 pointed out, that agreement is quite clear that the SEC can
4 use those documents in furtherance of its duties.

5 **THE COURT:** All right. Tell me how - tell me why
6 you oppose entry of a protective order at this point. If
7 we're talking about discovery of these documents and making
8 them available to the Defendants for their use in the
9 litigation, what's the issue here? How does the SEC intend
10 to use them to discharge its duties and responsibilities
11 that would violate that protective order if it was entered?

12 **MR. GALLOWAY:** Well, for example, Judge, filing
13 motions for summary judgments. Any number of pretrial
14 motions that might be filed when we have a sealing order
15 places a tremendous burden, particularly on an agency like
16 ours, which is, you know, we don't have near the resources
17 that the Defendants have, but we just don't think that it's
18 warranted to have a protective order in this case. They've
19 got to demonstrate a specific reason for it, and thus far
20 all I've heard are conclusory statements.

21 **THE COURT:** Well, they've got some specifics in
22 the affidavits and Judge Sanders has agreed with them that
23 this type of information - he's previously agreed with them
24 that this very type of information as represented by Mr.
25 Welch, some of this very same information is protected. Why

1 doesn't that meet their burden to show that that's
2 confidential?

3 **MR. GALLOWAY:** Well, first and foremost it's
4 stale. The conduct at issue in this case occurred in 2000
5 and 2001. To the extent their documents from '03, they
6 relate back to the earlier misconduct by i2, and when Judge
7 Sanders considered this he had before him an agreement among
8 all the parties in the case - and that was in November of
9 2003 and here we are in January of '06, the documents are
10 far more outdated now than they were then.

11 **THE COURT:** What about their argument that it's
12 technology or it's information that's still used. We're not
13 talking about a computer chip that's obsolete now or
14 something like that, are we?

15 **MR. GALLOWAY:** What we're talking about is a bunch
16 of e-mails primarily, Your Honor. We're not talking about a
17 source code, we're not talking about something that a
18 competitor or somebody can get his hands on, and a perverse
19 engineer that - the software. That's not at all what's at
20 issue here. This is not an intellectual property case; this
21 is a fraud case and we intend to prove that the Defendants
22 knew that they were selling nonfunctional software and we
23 intend to do that by their own communications, not by
24 proving that their code - we haven't asked for any codes.
25 I'll put it that way, Judge. That's the kind of thing in my

1 mind that could be protected. This is - you know, this is
2 just routine business arrangement.

3 **THE COURT:** So as I understand your argument, the
4 SEC - really how you would be harmed by a protective order
5 is that it would make it harder for you when you're filing
6 your motions for summary judgment and trying to use some of
7 these documents in court proceedings.

8 **MR. GALLOWAY:** That and the fact that we are a
9 public agency. We bring our litigation in public interest.
10 The public has a strong interest in observing litigation
11 being conducted in its name, so this differs. And I've
12 heard over and over how it's routine to have a protective
13 order in these types of cases but what the defense side
14 seems to be missing in my view is that this isn't a routine
15 case like a commercial dispute. This is a law enforcement
16 proceeding.

17 **THE COURT:** Law enforcement proceeding against
18 three former employees of a company whose documents are at
19 issue here.

20 **MR. GALLOWAY:** A company who overstated its
21 revenues by a billion dollars, who is coming into court -
22 frankly, the equities aren't really so much in favor of i2
23 here. It's not apparent why they need this protective
24 order. What appears to be the reason is that they want to
25 avoid further litigation, Judge, and I understand that, I

1 don't blame them, but that's no reason for a protective
2 order.

3 **THE COURT:** Well, that's not necessarily a reason
4 for a protective order in my mind either, but at this point
5 I think they've made their showing that the documents that
6 are at issue here, and given the scope of the production -
7 we're talking about over 500,000 documents, whether hard
8 copy or electronic format, but the proposed protective order
9 gives the parties ample opportunity and means for
10 challenging any designation as confidential, and once you
11 get to the summary judgment stage then the whole judicial
12 document open to the public's analysis can really be made at
13 that point, but I'm having trouble seeing the harm in
14 designating the documents confidential for purposes of
15 discovery, given the enormity of the amount of documents
16 here and the fact that i2 is not in this lawsuit. I
17 understand your position about i2 but that was a separate
18 lawsuit. Apparently that's been resolved and we've got
19 three non party or non i2 Defendants here.

20 **MR. GALLOWAY:** That's correct, Your Honor, and
21 there is a large volume of information. Certainly I'm not
22 shying away from that. It's just my understanding that the
23 Fifth Circuit requires the movant to make a specific - a
24 particular and specific demonstration of fact as
25 distinguished from stereotype and conclusory statements.

1 **THE COURT:** Uh-huh, and I think that they have
2 made that. I think that the affidavits in support, coupled
3 with the previous finding of Judge Sanders regarding some of
4 this very same information, I think meets that standard, and
5 I am not ordering that those documents not be produced;
6 you've already got them. I'm only ordering that the
7 documents be produced to the Defendants subject to a
8 protective order, and they don't have any objection to a
9 protective order, so I understand the position about the
10 public documents but I think the Lagosch, Lagosh, however you
11 pronounce that case, I think it's very distinguishable.
12 We're not talking about summary judgment materials here.

13 So, I am going to grant the motion for a
14 protective order and I'm going to enter the protective order
15 that's attached to the Defendants' motion in this case.

16 Is there anything else that we need to address
17 with regard to the motion - any pending discovery, any other
18 matters that are --

19 **MR. GALLOWAY:** Not from the Commission's
20 standpoint, Your Honor.

21 **MR. WELCH:** No, Your Honor.

22 **THE COURT:** And from the Defendants? I'll give
23 you an opportunity to raise any issues that we need to talk
24 about.

25 **MS. O'CONNOR:** None, Your Honor. We look forward

1 to obtaining discovery as soon as possible, now that the
2 protective order is being entered.

3 **THE COURT:** I'll enter the protective order today.
4 What kind of time frame are we looking at for producing - I
5 believe the documents are ready and available to be
6 produced, it's just a matter of entering the order?

7 MR. GALLOWAY: Yes, Your Honor. We can produce
8 everything we have within the next day or two.

9 **THE COURT:** Okay. Anything else that we need to
10 discuss? All right. Well, thank you very much. I'll
11 return your documents to you, Mr. Galloway, and we are
12 adjourned.

13

14 (Proceedings Concluded)

15

16 I certify that the foregoing is a correct
17 transcript from the electronic sound recording of the
18 proceedings in the above-entitled matter.

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Date: June 8, 2009

/s/Betty Tate, Transcriber
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